

SITHABILE NDEBELE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MAKONESE JJ
BULAWAYO 9 SEPTEMBER AND 28 NOVEMBER 2013

Mr M Ncube, for appellant
Mr W. Mabaudhi, respondent's counsel

Criminal Appeal

KAMOCHA J: The appellant who was 49 years at the time of the commission of the alleged offence pleaded not guilty to contravening section 157 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (found in possession of a dangerous drug). It was alleged that on 15 June 2012 appellant unlawfully possessed 100 grammes of dagga at house number 34, Belmont Nkayi.

She pleaded not guilty on arraignment but was convicted at the end of the trial despite all her protestations. She was then sentenced to 6 months imprisonment of which 2 months imprisonment was suspended for 5 years on condition of future good behaviour. A further 4 months imprisonment was suspended on condition appellant completes 140 hours of community service.

She has noted this appeal against conviction only. She does not quarrel with the sentence.

She assailed the conviction on four grounds as follows:

- "1. The court *a quo* misdirected itself in concluding that the onus to prove the absence of *meus rea* rests on the accused which is a complete misrepresentation and misinterpretation of the law, i.e turning on its head and thus wrongly convicted the appellant.
2. The court *a quo* misdirected itself in concluding that appellant failed to co-operate or frustrated police in efforts to find *Andrew Ncube* when in fact there was no evidence on record to that effect by any witness and thus the court on that basis wrongly convicted the appellant.
3. The court *a quo* misdirected itself in rejecting the existence of *Andrew Ncube*

when in fact the State failed to disprove the same.

4. The court *a quo* misdirected itself in making a finding of guilty of the accused when in fact and at law there was no evidence led by the state to prove appellant's guilty i.e case was not proven beyond reasonable doubt.

WHEREFORCE it is prayed that the conviction and sentence of the appellant be and are hereby set aside."

It is common cause that dagga weighing 100 grammes was found in the appellant's house in her bed room. But the appellant contended that she was not aware of the dagga as it was contained in a bag which had been left by one *Andrew Ncube* who had left the bag during the month of March 2012. It was her story that she told the police about *Andrew Ncube* leaving his bag with her for safe keeping but the police chose to ignore what she said.

It was her submission that she lacked the requisite *meus rea* to possess the dagga. The State called two police officers namely Sergeant *Matinha* and Constable *Linda Chakauya*. The testimony of Constable *Linda Chakauya* "*Chakauya*" was that on 15 June 2012 a report was received at Nkayi Police station that a school pupil who was a niece of the accused one *Samukeliso Ndebele* was found in possession of dagga at her school. The school authorities brought her to the Police Station. The witness then called Sergeant *Matinha* who interviewed the young girl who ended up telling the police that she found the dagga in her aunt's bed room as she was sweeping it. The aunt was the appellant *Sithabile Ndebele*.

Chakauya together with other police officers went to collect the appellant from her home. When she was questioned about the dagga she denied any knowledge of it. Sergeant *Matinha* instructed Constable *Tiziraj*, Constable *Lusinga* and the witness to go with her to her homestead to conduct a search there. On arrival at her homestead *Lusinga* requested that they search appellant's bed room.

The appellant refused to allow them to enter her bedroom and conduct a search. The reason she gave was that her bedroom was dirty with her underpants lying all over. She went on to request that Sergeant *Matinha* himself should come. The team phoned him and he arrived without delay with two more police officers namely Constable *B. Moyo* and Constable *Mhlanga*.

The appellant requested to speak to Sergeant *Matinha* privately in order to negotiate how the search of the bedroom should be conducted as the room was dirty. The negotiations failed. The appellant then requested that a female officer enters the bedroom and conduct the search.

The witness then entered the room with her. While inside the room appellant handed over to her a plastic dish with dagga and she said she uses the dagga for medicinal purposes. They went out of the room and proceeded to where Sergeant *Matinha* was and took the appellant to the station where she was handed over to the officer in charge assistant inspector

Mpofu.

The witness said the appellant did not mention *Andrew Ncube* when she was handing over to her the small plastic dish containing the dagga.

I pause to note that the dagga she handed *Chakauya* was in a plastic dish not in a bag.

The witness was cross examined at some length. The record shows seven pages of cross examination during which it was on many occasions suggested that the witness was untruthful but her story that the accused handed to her the 100 grammes in a small plastic dish remained intact and so was the fact that the accused never mentioned anything about *Andrew Ncube* to her. The fact that appellant never mentioned *Andrew Ncube* to the witness was never challenged under the lengthy cross examination. It is therefore true that the appellant never mentioned to her the said *Andrew Ncube*. Instead the witness was asked if she had not noticed evidence of burnt traditional herbs in her bedroom but the witness said she had not. One wonders why such a question was asked if it was not meant to support the appellant's claim that she used the dagga for medicinal purposes. That also was not challenged under long winded cross examination which dwelt on peripheral issues.

Sergeant Last *Matinha* who has been in the ZRP for 11 years told the court that he knew the accused as a local Politician in Nlkayi.

On 15 June 2012 at around 1600 hrs he was called to the office where he found Constable *Chakauya* with a school pupil who had been brought to the police station by some school authorities. Her name was *Samkeliso Ndebele*. She had allegedly been found in possession of dagga at school. The school authorities took her to the police station for further investigation to establish where the girl had got the dagga from. The sergeant then asked her where she had got the dagga from and she told him she had got the dagga from her aunt's bedroom – appellant's bedroom. When probed further about what she was doing in the appellant's bedroom her response was that she was sweeping it. *Matinha* interviewed the girl in the presence of Constable *Chakauya*. He dispatched a team of police officers to go and collect the appellant. He at the same time released the girl to go and remove her school uniform.

When the appellant was brought to the station *Matinha* informed her about the allegations the girl was facing. When he asked the appellant if she knew anything about the dagga she denied having any knowledge of it.

Matinha then instructed Constables *Lusinga*, *Tizirai* and *Chakauya* to go with the appellant to her homestead to conduct a search. The team went with the appellant to her residence and while they were there constable *Lusinga* phoned the witness reporting that the appellant had refused them access to her bed room and preferred *Matinha* himself to conduct the search. He then proceeded to the appellant's homestead with Constables *Mhlanga* and

Moyo. On arrival, they found everybody outside.

Matinha asked the appellant why she would not allow the police officers to enter her house. Her response was that her house was not in order as pants were scattered all over. He assured her that police would not go about telling people what they would have seen in her house. She then requested to be searched by a few. The witness then assigned Constable *Mhlanga* and Constable *Chakauya* to conduct the search. She went with those two but before she opened the door, she changed her mind returned to the witness and requested to talk to him away from others.

The two moved away from the rest for a few metres. While they were by themselves the appellant first insisted that her room was not in order. She followed that by a request that the witness himself searches the room and after doing so he should pretend that there was no dagga in the room. The witness turned down her request. That did not deter her, instead she told the witness that she had dagga in the house, but she requested that she be allowed to enter the room alone and bring the dagga but the witness did not accede to that request either. On realising that she should not tempt a police officer any further, she then requested to be accompanied by a female officer Constable *Chakauya* as her under pants were scattered all over. The witness acceded to that request. One wonders how many under pants she wore per day which would be scattered all over her bedroom unless she is a very careless and unclean woman.

The two then returned to the other police officers where *Chakauya* was assigned to conduct the search.

Chakauya and the appellant entered the bed room but emerged there from shortly thereafter with *Chakauya* carrying a plastic bag containing dagga. A search was conducted in the other rooms of the main house but no more dagga was found.

The team then proceeded to the Police station with the appellant leaving the school girl *Samukeliso* at home. On the way the appellant requested *Matinha* to allow her to pay a deposit fine. He told her that he could not do so because of the quantity of dagga that she possessed. The matter was going to court.

The witness was subjected a lengthy cross examination but his story did not change. Too much time was spent on what related to *Samukeliso*.

What came out of that was that *Samkeliso* got the dagga she was found in possession of from the appellant's bed room. And indeed the appellant produced the dagga that is the subject of this matter from her bedroom.

It was suggested towards the end of cross examination that appellant told the witness that the dagga had been brought into her bed room by *Andrew Ncube*. The response of the

witness was that there was no truth in that suggestion.

There is merit in the response that the suggestion was false. If it had been true the appellant would not have gone to the extent of trying to lead the witness into temptation by suggesting that he should not do his job properly. Further, when she finally confessed to the witness that there was dagga in her bedroom she would at that stage, have said the dagga was brought by *Andrew Ncube*. Further more, why did she request the witness to allow her to pay a deposit fine if the dagga was not hers and she had no knowledge of its presence in her bedroom.

The suggestion that the dagga belonged to *Andrew Ncube* was deliberately not made to *Chakauya* because the appellant had told her that she used the dagga for medicinal purposes although did not mention the ailment she used the dagga for. It is clear that the appellant was the owner of the dagga. She was a careless possessor of dagga who let it fall into wrong hands of a young girl *Samukeliso*. The dagga belonged to the appellant for her personal use or for supply to other people.

Therefore, the court *a quo* cannot be faulted for finding that appellant was the owner of the dagga and not *Andrew Ncube*.

It is difficult to understand why the appeal against conviction was made in the light of such over whelming evidence against the appellant. The appeal against conviction is devoid of any merit.

The appellant did not appeal against the sentence imposed by trial court although she suggested in her prayer that the sentence should be set-aside. There is nothing wrong with that sentence.

In the result, the appeal fails and is hereby dismissed in its entirety.

Makonese J I agree.....

Phulu and Ncube, Appellant's Legal Practitioners
Attorney- General's office, Respondent's Legal Practitioners